BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

TROY SPENCER	)	
Claimant	)	
	)	
VS.	)	
	)	
EARNSHAW PAINTING[1]	)	
Uninsured Respondent	)	Docket No. 1,036,389
	)	
AND	)	
	)	
THE KANSAS WORKERS COMPENSATION FUND	)	

ORDER

STATEMENT OF THE CASE

Claimant requested review of the September 26, 2008, preliminary hearing Order entered by Administrative Law Judge Marcia L. Yates Roberts. Pamela J. Billings, of Kansas City, Missouri, appeared for claimant. Robert Earnshaw of Shawnee, Kansas, appeared pro se. Michael R. Wallace, of Shawnee Mission, Kansas, appeared for the Kansas Workers Compensation Fund (Fund).

The Administrative Law Judge (ALJ) found that claimant did not sustain his burden of proof that he was an employee of respondent. Therefore, the ALJ denied his request for workers compensation benefits.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the September 25, 2008, Preliminary Hearing and the exhibits, the transcript of the February 14, 2008, Preliminary Hearing and the exhibits, the transcript of the deposition of Brian Wilson taken January 22, 2008, and the transcript of the deposition of Robert Earnshaw taken December 7, 2007, and the exhibits, together with the pleadings contained in the administrative file.

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[1] Respondent is identified in its tax records as Robert Earnshaw Painting, LC. P.H. Trans., Resp. Ex. E, F and G (Feb. 14, 2008). It is identified as Earnshaw Painting L.C. on its business checks. P.H. Trans., Resp. Ex. B, C and D (Feb. 14, 2008). Robert Earnshaw testified that the business is a corporation. Earnshaw Depo. at 16 (Dec. 7, 2007).

ISSUES

Claimant requests review of the ALJ's finding that claimant was not an employee of respondent but was, instead, an independent contractor.

The Fund argues that the issue of whether claimant is an employee of respondent is not an issue enumerated in K.S.A. 44-534a(a)(2) and, therefore, the Board does not have jurisdiction over the issue in an appeal from a preliminary hearing order. In the event the Board finds it has jurisdiction over this issue, the Fund argues that respondent did not exercise sufficient control over claimant to sustain a finding that he was an employee of respondent. Accordingly, the Fund requests that the Board affirm the decision of the ALJ.

The respondent has not filed a brief in this appeal.

The issues for the Board's review are:

(1) Does the Board have jurisdiction of this appeal?

(2) If so, did the claimant sustain his burden of proving that he was an employee of respondent at the time of his alleged injury?

FINDINGS OF FACT

Claimant testified that he started working for respondent in the fall of 2003 or 2004 and was hired as a painter. Robert Earnshaw, respondent's owner, testified that claimant was not an employee of respondent but, instead, was an independent contractor.

In support of his position that he was an employee of respondent, claimant testified that he had no contract with respondent. He said that Mr. Earnshaw would meet with him at a job site and tell him what needed to be done and how much he would be paid for the job. He was paid by the job, not on an hourly basis. He testified that the amount he was paid by respondent did not include the cost of materials. All paint, lumber and other materials were paid for by respondent. Claimant said that Mr. Earnshaw would either give him cash or write him a check to cover the cost of lumber. He introduced as an exhibit a copy of a check written to him by Mr. Earnshaw in the amount of $300 wherein, on the memo line, Mr. Earnshaw had noted the check was for "lumber/sub-contractor." When claimant needed paint, he said he would use respondent's account at Sherwin Williams.

Claimant said he worked with several people, including his girlfriend, Toni Walton, his son, and Russell Tanner. Claimant paid these people out of the money he earned from respondent. Claimant said that at times respondent furnished him with other help. He said that respondent advertised in newspapers for painters and entered a copy of one of the advertisements as an exhibit. He also testified that at times, respondent would provide claimant with people hired from a temporary staffing agency. Claimant stated that

respondent would pay the temporary staffing agency for those workers. Claimant testified that he was not allowed to hire helpers himself without approval from Mr. Earnshaw.

Claimant testified that the work he performed for respondent was seasonal and would start sometime in March and last until mid to late November. Claimant said it was his understanding that if he did any side jobs during that painting season, he would no longer be allowed to work for respondent. He was allowed to work for other people during the off season.

Claimant testified that Mr. Earnshaw had control over the hours he worked. He said Mr. Earnshaw would call him, for example, to tell him to start early in the morning to finish before it got too hot. Or if it was windy, Mr. Earnshaw would call him and tell him to stop spraying. Claimant said he would call Mr. Earnshaw when he finished a job, and Mr. Earnshaw would do a walk around and check the job. If he noticed an area that needed touching up, claimant would have to fix it. He said Mr. Earnshaw would give him written lists of instructions and introduced three of those lists as exhibits.

Claimant also testified that respondent provided him with the tools he needed to perform the work. He said the ladders he used belonged to respondent. Claimant's girlfriend and coworker, Toni Walton, also testified that the ladders they used on jobs belonged to respondent. She testified that claimant had no ladders, sprayers or other equipment. Both she and claimant testified that at the end of the season, they would load up the ladders, take them to Mr. Earnshaw's home, and stack them in his backyard.

Ms. Walton admitted that she was hired and paid by claimant, as were the other employees who worked with them. She said that on occasion, she and claimant would take a day off instead of going to a job site. She also, however, testified that Mr. Earnshaw would give her instructions on a job site and at times would send her out to buy supplies.

Robert Earnshaw testified that he is a painting contractor and had used claimant as a subcontractor off and on since the fall of 2004. Claimant was paid by the job, and they had no contract. Mr. Earnshaw provided him with a Form 1099 every year he used him. He never provided claimant with a W-2. Mr. Earnshaw said he uses several subcontractors and has never had a subcontractor sign a waiver in the 20 years he has been in business. All the subcontractors he has used have their own company, equipment and employees. Mr. Earnshaw denied that his business was seasonal and said he had projects year round.

Mr. Earnshaw said he would call claimant and ask about his availability for a job. If claimant was available, he would describe the job and give him the address. Claimant would then call him back and quote a price for the job. That quote would include the cost of paint and supplies. He denied providing claimant with any tools, ladders, or paint. He denied that claimant would bring ladders over to his house and stack them up at the end of the work year. He said that he has ladders stacked in his yard year round.

Mr. Earnshaw said he went with claimant on the first day of a job and told him what the job entailed. He would tell claimant what prep work and painting needed to be done and what type of paint to use. After that, it was up to claimant how he accomplished the job. Mr. Earnshaw said he rarely showed up on a job site after the first day until the job was completed. He would not give claimant instructions on carpentry or repair work that needed to be done before painting could be started.

Mr. Earnshaw said that the notes claimant introduced as exhibits were actually his personal to-do lists. He makes notes because he sometimes has more than one project going at a time. He keeps the notes in his pickup. Mr. Earnshaw did not know how claimant got hold of those notes and suspects he took them out of his pickup.

Mr. Earnshaw said that after a job was completed, claimant would do a walk-around with the customer to make sure the customer was satisfied. Then claimant would call Mr. Earnshaw and tell him the job was completed. Mr. Earnshaw would go to the site and quickly look over the work. If anything was missing, he would point that out. He would pay claimant after the job was complete. Mr. Earnshaw said that if modifications or changes occurred during the course of a job, claimant would call Mr. Earnshaw and give him a quote for those changes. Mr. Earnshaw did not supervise claimant or direct him in his methods of doing the work.

Mr. Earnshaw did not handle the hiring of any people who worked with claimant and said that claimant hired whomever he wanted. Claimant paid his employees out of the money he was paid for the job. Mr. Earnshaw never fired anyone off a job site where claimant was working. Mr. Earnshaw said that on one occasion, he ran a newspaper advertisement for claimant. Claimant's son had quit working during a job, and claimant called Mr. Earnshaw saying he needed one or two painters. Claimant told Mr. Earnshaw that he had poor credit, no credit card, and no bank account. Mr. Earnshaw agreed to run the advertisement in the paper for claimant as a favor. He said he did not hire any painters as a result of the advertisement. He said that if anyone answered the advertisement, he gave them claimant’s number. He admitted that one time he went through a temporary staffing agency to hire an assistant for claimant. That painter worked a day or two, and respondent paid the staffing agency and deducted that amount from the price claimant had quoted him for the job.

Mr. Earnshaw said that the check shown in claimant's Exhibit 3 to the preliminary hearing was made out to claimant and the memo line indicates the check was for "lumber/sub-contractor." He said that he and claimant had been arguing that day and he hurriedly made out the check. He is not sure why he added the word "lumber" on the check. The check was issued on July 18, 2007, after the accident, and was close to the time the relationship between respondent and claimant ended.

On April 30, 2007, claimant injured his right foot when he fell off the roof of a house where he was doing some touch-up painting. He said he reported his fall to respondent.

He testified that Mr. Earnshaw told him to go to the emergency room. He said that later he found out that respondent did not have workers compensation insurance. He testified that Mr. Earnshaw told him to throw away his medical bills and then file bankruptcy. Mr. Earnshaw denied telling claimant to go to the emergency room and denied telling him to throw away his medical bills and declare bankruptcy.

PRINCIPLES OF LAW

The Board's jurisdiction to review a preliminary hearing order is limited. K.S.A. 2007 Supp. 44-551(i)(2)(A) states in part:

> If an administrative law judge has entered a preliminary award under K.S.A. 44-534a and amendments thereto, a review by the board shall not be conducted under this section unless it is alleged that the administrative law judge exceeded the administrative law judge's jurisdiction in granting or denying the relief requested at the preliminary hearing.

K.S.A. 44-534a(a)(2) states in part:

> Upon a preliminary finding that the injury to the employee is compensable and in accordance with the facts presented at such preliminary hearing, the administrative law judge may make a preliminary award of medical compensation and temporary total disability compensation to be in effect pending the conclusion of a full hearing on the claim, except that if the employee's entitlement to medical compensation or temporary total disability compensation is disputed or there is a dispute as to the compensability of the claim, no preliminary award of benefits shall be entered without giving the employer the opportunity to present evidence, including testimony, on the disputed issues. A finding with regard to a disputed issue of whether the employee suffered an accidental injury, whether the injury arose out of and in the course of the employee's employment, whether notice is given or claim timely made, or whether certain defenses apply, shall be considered jurisdictional, and subject to review by the board. . . Except as provided in this section, no such preliminary findings or preliminary awards shall be appealable by any party to the proceedings, and the same shall not be binding in a full hearing on the claim, but shall be subject to a full presentation of the facts.

In *Allen*,[2] the Kansas Court of Appeals stated:

> Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.

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[2] *Allen v. Craig*, 1 Kan. App. 2d 301, 303-04, 564 P.2d 552, *rev. denied* 221 Kan. 757 (1977).

K.S.A. 2007 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2007 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

Generally, an independent contractor is someone who contracts to perform a piece of work according to his or her own methods and without being subject to the control of an employer, except as to the final result.[3] An employer, however, is someone who employs another to perform services in his affairs and who controls or has the right to control the conduct of the other in performing those services.[4] Although there are a number of factors to consider when making this decision, particular emphasis is placed on the employer's right to control the worker.[5]

The relationship of the parties depends upon all the facts of the case. What label they use in describing each other is only one of those facts to be considered. The terminology used by various parties is not binding when determining whether an individual is an employee or an independent contractor.[6]

> The primary test used by the courts in determining whether the employer-employee relationship exists is whether the employer has the right of control and supervision over the work of the alleged employee, and the right to direct the manner in which the work is to be performed, as well as the result which is to be accomplished. It is not the actual interference or exercise of the control by the employer, but the existence of the right or authority to interfere or control which renders one a servant rather than an independent contractor.[7]

In addition to the right to control and the right to discharge the worker, other recognized tests of the independent contractor relationship are:

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[3] *Wallis v. Secretary of Kans. Dept. of Human Resources*, 236 Kan. 97, 102, 689 P.2d 787 (1984); *Krug v. Sutton*, 189 Kan. 96, 98, 366 P.2d 798 (1961).

[4] *Russell v. H & K Delivery*, Docket No. 192,809, 1998 WL 462620 (Kan. WCAB July 24, 1998).

[5] *Hartford Underwriters Ins. Co. v. Kansas Dept. of Human Resources*, 272 Kan. 265, 270, 32 P.3d 1146 (2001).

[6] *Knoble v. National Carriers, Inc.*, 212 Kan. 331, 337, 510 P.2d 1274 (1973).

[7] *Wallis*, 236 Kan. at 102-03.

(1) the existence of a contract to perform a certain piece of work at a fixed price;

(2) the independent nature of the worker's business or distinct calling;

(3) the employment of assistants and the right to supervise their activities;

(4) the worker's obligation to furnish tools, supplies and materials;

(5) the workers' right to control the progress of the work;

(6) the length of time that the worker is employed;

(7) whether the work is paid by time or by the job; and

(8) whether the work is part of the regular business of the employer.[8]

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[9] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2007 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[10]

ANALYSIS

Whether claimant was an employee of respondent or, instead, was an independent contractor is an issue which the Board has jurisdiction to review on an appeal from a preliminary hearing order because it gives rise to a disputed issue of whether claimant's injury arose out of and in the course of the employee's employment. Stated another way, it gives rise to a disputed issue of whether claimant and respondent had an employee/employer relationship. The respondent's allegation that claimant was not an employee but was, instead, an independent contractor is also a certain defense as it goes directly to the compensability of the claim, that is whether the Workers Compensation Act applies to claimant's accident and injury.

The facts in this case are more analogous to an independent contractor relationship between claimant and respondent than they are to an employee/employer relationship. Applying the tests followed by the court in *McCubbin* establishes the following:

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[8] *McCubbin v. Walker*, 256 Kan. 276, 281, 886 P.2d 790 (1994).

[9] K.S.A. 44-534a; see *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[10] K.S.A. 2007 Supp. 44-555c(k).

(1) Although there was no written contract, the agreement between claimant and respondent was that claimant would perform a job or piece of work at a fixed price.

(2) Commercial painting and carpentry can be an independent business or distinct calling, but it is not always or necessarily so. It appears that both claimant and respondent confined their work primarily to painting and some limited carpentry.

(3) Although this is disputed, claimant employed and supervised his own employees.

(4) Again in dispute, claimant mostly furnished his own tools, supplies and materials.

(5) Claimant was given a time frame within which he was to complete his work, but claimant was free to manage his own hours and those of his workers.

(6) Claimant worked almost exclusively for respondent, and their relationship continued over an extended period of time.

(7) Claimant was paid by the job, not by the hour.

(8) The work is part of respondent's regular business.

From the above list, only numbers 6 and 8 suggest an employer/employee relationship, whereas the rest of the factors are indicative of a principal/subcontractor or independent contractor relationship. Respondent's right to control claimant once a job and its terms were agreed to was limited to the final result. Based upon the record presented to date, this Board Member finds that claimant's relationship with respondent was that of an independent contractor, not an employee. Accordingly, the Workers Compensation Act does not apply to claimant's accidental injury.

CONCLUSION

(1) The Board has jurisdiction of the issue raised in this appeal.

(2) Claimant was not an employee of respondent at the time of his accident.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Marcia L. Yates Roberts dated September 26, 2008, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of December, 2008.

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HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: Pamela J. Billings, Attorney for Claimant
Robert Earnshaw, 10420 West 63rd Terrace, Shawnee, Kansas, 66203
Michael R. Wallace, Attorney for the Kansas Workers Compensation Fund
Marcia L. Yates Roberts, Administrative Law Judge